TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 110.

P. M. CHILDERS, APPELLANT,

vs.

R. W. McCLAUGHRY, WARDEN OF THE UNITED STATES PENITENTIARY AT LEAVENWORTH, KANSAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED MARCH 28, 1908.

(21,085.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 2, 1909.

1 In the District Court of the United States within and for the District of Kansas.

In re Petition of P. M. CHILDERS for Writ of Habeas Corpus.

Citation.

UNITED STATES OF AMERICA,
District of Kansas, ss:

The President of the United States to Harry J. Bone, United States Attorney for the District of Kansas, Greeting:

You are hereby cited and admonished to be and appear *to* the Supreme Court of the United States, in the City of Washington, D. C., within 30 days from the date of this Writ pursuant to an appeal filed in the office of the Clerk of the United States District Court for the District of Kansas in the above entitled matter and show cause, if any there be, why the judgment in said appeal mentioned should not be corrected and speedy justice should not be done to the petitioner therein in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 28th day of February, 1908.

JOHN C. POLLOCK,
United States District Judge.

Service of the foregoing Citation is hereby accepted this 28th day of February, A. D. 1908.

J. S. WEST,
Assistant United States Attorney.

1½ [Endorsed:] No. 992. In re P. M. Childers. Citation. Filed Feb'y 28, 1908. Morton Albaugh, Clerk, by F. L. Campbell, Dep. Clerk.

2 In the United States District Court for the District of Kansas, First Division, Sitting at Topeka.

In re P. M. CHILDERS.

Petition for Habeas Corpus.

To the Honorable John C. Pollock, Judge of the United States District Court for the District of Kansas, sitting in First Division, at Topeka:

Your petitioner, P. M. Childers, respectfully represents that he is a prisoner unjustly and unlawfully detained and imprisoned within the United States Penitentiary at Leavenworth, Kansas, in the custody of R. W. McClaughry as Warden of said Penitentiary;

that he is held in custody under and by virtue of the authority of the United States; that the facts concerning the unlawful and illegal detention of your petitioner are these:

That heretofore, to wit, on the 31st day of October, A. D. 1906, he was charged by indictment found by a grand jury empaneled by the United States Court for the Northern District of the Indian Territory, sitting at Nowata, Indian Territory, with the crime of murder alleged in said indictment to have been committed on the sixth day of August, 1906; that said crime with which your petitioner is charged by said indictment was in fact committed on the said sixth day of August, 1906; that your petitioner was tried for said charge on said indictment and convicted of murder without capital punishment on the 17th day of June, 1907, in the United States Court for the Northern District of the Indian Territory, sitting at Vinita, Indian Territory; that on the same day, to wit, June 17th, 1907, your petitioner was sentenced by the Honorable Joseph A. Gill, Judge of said United States Court, to be imprisoned in the penitentiary situated at Fort Leavenworth, Kansas, for the term and period of his natural life at hard labor, and on the same day,
3 to wit, June 17th, 1907, commitment was issued by said court remanding your petitioner to the custody of the keeper of said penitentiary at Fort Leavenworth, Kansas, in conformity with said sentence and your petitioner is now detained unlawfully and illegally by the said R. W. McClaughry under and by virtue of said commitment.

Your petitioner further alleges that on the 16th day of June, 1906, and prior to the return of said indictment and the commission of said crime of murder as charged therein, jurisdiction of said crime was taken from the said United States Court for the Northern District of the Indian Territory by an Act of Congress approved on said June 16th, 1906; that by virtue of said Act of Congress the said United States Court had no jurisdiction of said crime at the time the same was committed and by virtue of said Act of Congress the said United States Court had no jurisdiction of said crime at the time said indictment was returned on the 31st day of October, 1906, as aforesaid, nor at any time thereafter, and had no authority in law to empanel a grand jury to inquire into the commission of said offense; that the empaneling of said grand jury was unlawful and without authority of law and the action of said grand jury so unlawfully empaneled as aforesaid, in returning said indictment as aforesaid against your petitioner was illegal and void and without authority of law.

Your petitioner alleges that the indictment so returned by the grand jury as aforesaid was void and gave to said court no jurisdiction whatever to try and determine the offense charged therein.

Your petitioner further alleges that by reason of the Act of Congress aforesaid, all the proceedings had and done by said court in the finding of said indictment and the trial and conviction of your petitioner thereon of murder without capital punishment as aforesaid, and the sentence imposed by said court as aforesaid, and the commitment issued as aforesaid, were each and all void and
4 of no effect and were done and made in excess of the jurisdiction of said court and without authority of law; that the

restraint of your petitioner as aforesaid under said commitment issued as the result of said conviction on said void indictment returned by said unlawful grand jury as aforesaid is depriving him of his liberty without due process of law in violation of Article five of the amendments to the Constitution of the United States and the act of said court in holding your petitioner to answer to said charge in the manner aforesaid was in further violation of Article five of the amendments to the Constitution of the United States in that it deprived him of his right to be held to answer said charge on presentment to the proper court having jurisdiction of said offense by a grand jury duly empaneled.

Your petitioner attaches hereto a duly certified copy of said indictment so returned as aforesaid, with the verdict of the jury thereon as aforesaid, under the hand and seal of the Clerk of said United States Court, marked Exhibit "A" and made a part hereof.

Your petitioner also attaches hereto a duly certified copy of the judgment, sentence and order of said court entered by said court upon said verdict of guilty as aforesaid, marked Exhibit "B" and made a part hereof.

Your petitioner also attached hereto a duly certified copy of the commitment by virtue of which he is detained in the custody of said warden, marked Exhibit "C" and made a part hereof.

Your petitioner further alleges that he is informed and believes, and so charges the truth to be, that the United States Penitentiary at Fort Leavenworth, Kansas, was on the first day of February, 1906, returned to the War Department of the United States by the Attorney General of the United States acting in accordance with law, and that after the return of said Penitentiary at Fort Leavenworth, Kansas, to said War Department as aforesaid, and
5 prior to the sentence of your petitioner by said United States Court for the Northern District of the Indian Territory to confinement in said United States Penitentiary at Fort Leavenworth, Kansas, and prior to the issuance of the commitment herein, the said Attorney General of the United States, acting in conformity with law, had, by proper order, designated the United States Penitentiary at Leavenworth, Kansas, as the place of confinement for prisoners of the class of your petitioner, convicted by said United States Court for the Northern District of Indian Territory, which said order was in full force and effect at the time said sentence was pronounced and said commitment issued as aforesaid: that by virtue of said order, said United States Court was without authority to direct the confinement of your petitioner in any place of confinement other than said United States Penitentiary at Leavenworth, Kansas, and in sentencing your petitioner to said Penitentiary at Fort Leavenworth, Kansas, said court acted without authority of law and without its jurisdiction.

Your petitioner further alleges that Section 2307 of Mansfield's Digest of the laws of Arkansas was in force in said Northern District of Indian Territory as a law of the United States at the time said sentence was imposed as aforesaid, which said section reads as follows:

SECTION 2307. Upon verdicts in cases of misdemeanors and verdicts of acquittal in cases of felony, and upon trial by the court, and upon a plea of guilty, the court may immediately render judgment; but, upon verdicts of conviction in cases of felony, the court shall not pronounce judgment until two days after the verdict is rendered, unless the court is about to adjourn for the term, and then in not less than six hours after the verdict, except by the defendant's consent.

That it appears from Exhibits "A" and "B" hereto attached said verdict of conviction was rendered and said judgment pronounced upon the 17th day of June, 1907, and it does not appear from said Exhibit "B" that your petitioner consented to the pronouncing of sentence on said verdict before two days after said verdict
6 was rendered as aforesaid; that said court in pronouncing said judgment on the date said verdict was returned without the consent of your petitioner, acted without authority of law and without jurisdiction to pronounce said judgment.

That because of the premises above set forth your petitioner's detention is in violation of the constitution of the United States and the amendments thereto and is illegal and unlawful.

Wherefore, your petitioner prays from this Honorable Court a writ of Habeas Corpus to be directed to the said R. W. McClaughry, warden as aforesaid, so that your petitioner may be forthwith brought before this court to submit to and receive what the law may require.

P. M. CHILDERS.

STATE OF KANSAS,
County of Leavenworth, ss:

I, P. M. Childers, on oath do say that I am the petitioner named in the foregoing petition subscribed by me; that I have heard the same read and know the contents thereof and that the statements therein contained are true as I verily believe.

P. M. CHILDERS.

Subscribed and sworn to before me this the 23rd day of November, A. D. 1907.

[SEAL N. P.] JOHN H. ATWOOD, JR.,
Notary Public

My Com. expires Dec. 26th, 1908.

7 EXHIBIT "A."

Indictment for Murder in the Indian Territory.

Court No. —.

U. S. Attorney's Office No. —.

Grand Jury No. —.

UNITED STATES OF AMERICA,
Indian Territory, Northern District, ss:

In the United States Court in the Indian Territory for the Northern District of said Territory, at the October Term, A. D. 1906, at Nowata.

UNITED STATES
versus
P. M. CHILDERS, Defendant.

Indictment for Murder.

The Grand Jurors of the United States of America, duly selected, summoned, impaneled, sworn, and charged to inquire within and for the body of the Northern District of the Indian Territory aforesaid, in the name and by the authority of the United States, upon their oaths do find, present, and charge that one P. M. Childers, on the sixth day of August, A. D. 1906, within the Northern District of the Indian Territory aforesaid, with force and arms, in and upon the body of one Lena Atwood then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and that the said P. M. Childers with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he the said P. M. Childers in his hand then and there had and held, then and there feloniously, willfully, and of his malice aforethought did discharge and shoot off, at, to, against, and upon the body of the said Lena Atwood, and that the said P. M. Childers with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said P. M. Childers discharged and shot off as aforesaid, then and there feloniously, willfully, and of his malice aforethought, did strike, penetrate, and wound
8 her the said Lena Atwood in and upon the body of her the said Lena Atwood giving to her the said Lena Atwood then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid by the said P. M. Childers in and upon the body of her the said Lena Atwood one mortal wound of the depth of four inches and of the breadth of half an inch; of which said mortal wound, she the said Lena Atwood then and there instantly died. And so the Jurors aforesaid, upon their oaths aforesaid, do say that upon the day and year aforesaid,

and at the place aforesaid, the said P. M. Childers her the said Lena Atwood in the manner and by the means aforesaid, feloniously, willfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

O. H. GRAVES,
Ass't United States Attorney, Northern District of Indian Territory.

Verdict.

We, the jury, find the defendant P. M. Childers guilty of murder as charged in the within indictment, without capital punishment.

W. G. REAMER, *Foreman.*

North. Dist. Ind. Ter. Filed in Open Court at Vinita, I. T. Jun-17, 1907. Chas. A. Davidson, Clerk U. S. Court.

Witnesses.

Names.	Post-office address.
Barney Childers	Coffeyville, Kansas.
James Mayse	Childers, Ind. Ter.
Mack Stewart	Childers, Ind. Ter.
Dr. W. L. Stephens	Lenapah, Ind. Ter.
William Hancock	Lenapah, Ind. Ter.
Ernest Atwood	Coffeyville, Kansas.
Richard Atwood	Coffeyville, Kansas.
Hez. Steiwalt	Childers, Ind. Ter.
Al. Webster	Childers, Ind. Ter.

9 UNITED STATES OF AMERICA,
Indian Territory, Northern District, ss:

I, Chas. A. Davidson, Clerk of the United States Court in and for the Northern District of the Indian Territory, do hereby certify the within and foregoing to be a true and correct copy of the indictment in the case of the United States vs. P. M. Childers, number 296 on the docket of this court at Nowata, together with all the endorsements thereon, as the same appears from the original now on file in my office at Nowata, Indian Territory.

Witness my hand and the seal of said Court at Nowata, Indian Territory, this 5th day of March, A. D. 1907.

[SEAL.] CHAS A. DAVIDSON, *Clerk.*
By J. H. MOREHOUSE *Deputy.*

UNITED STATES OF AMERICA.
Indian Territory, Northern District, ss:

I, Chas. A. Davidson, Clerk of the United States Court within and for the Northern District of the Indian Territory, do hereby certify that the within and foregoing is a true and correct copy of the indictment, verdict of the jury, together with all endorse-

ments, in the case of the United States vs. P. M. Childers, No. 3575, on the criminal docket of the United States Court for the Northern District of the Indian Territory, at Vinita, as fully as the same appears from the files now in my office at Vinita.

Witness my hand and the seal of said court at Vinita, in said District, this the 15th day of November, 1907.

CHAS. A. DAVIDSON, *Clerk*.
By T. A. CHANDLER, *Deputy*.

Endorsed: No Bail. Criminal Docket No. 296. In the United States Court in the Indian Territory. Northern District. United States vs. P. M. Childers. Indictment for Murder. A true bill. R. W. Starr, Foreman of the Grand Jury. North. Dist. Ind. Ter. Filed in open Court in the presence of the Grand Jury at Nowata, I. T. Oct. 31, 1906. Chas. A. Davidson, Clerk. By T. A. Chandler, Deputy.

10 EXHIBIT "B."

In the United States Court in the Indian Territory, Northern District, *ss:*

June Term, 1907.

MONDAY MORNING, NINE O'CLOCK—*June 17th*, 1907.

Court met pursuant to adjournment.

Present: The Honorable Joseph A. Gill, Judge of the United States Court in the Northern District, Indian Territory.

No. 3575.

UNITED STATES
vs.
P. M. CHILDERS.

Indictment for Murder in the Indian Territory.

On motion of Wade S. Stanfield, Esq., Attorney for the United States Court in the Northern District, Indian Territory, the said defendant, P. M. Childers, was brought to the bar of the Court, in custody of the Marshal of said Court, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty without capital punishment heretofore returned by the jury against him in this cause on the 17th day of June, A. D. 1907, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said:

Whereupon, The premises being seen, and by the Court well and sufficiently understood, it is considered by the Court here that the said P. M. Childers, for his crime aforesaid, be imprisoned in the penitentiary situated at Ft. Leavenworth, Kansas, for the term and period of his natural life at hard labor, and that he pay to the United

States of America a fine of — Dollars, together with all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

It is further considered, That the Marshal of this Court, in whose custody the said P. M. Childers is now here committed, receive and safely keep and convey the body of the said P. M. Childers hence to said penitentiary without delay, and deliver him to the custody of the Keeper of said Penitentiary, who will receive and safely keep the said P. M. Childers in said Penitentiary in execution of the sentence aforesaid, and in conformity with the same, for the full period of the time aforesaid.

And it is further ordered, That the Clerk of this Court furnish the Marshal of this Court with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the Keeper of said Penitentiary and the other returned by the Marshal to this Court, with a full and true account of the execution of the same.

UNITED STATES OF AMERICA,
Indian Territory, Northern District, ss:

I, Chas. A. Davidson, Clerk of the United States Court for the Northern District of Indian Territory, do hereby certify that the within and foregoing is a true and correct copy of the judgment, sentence and order of court in criminal case No. 3575, United States vs. P. M. Childers, at Vinita, as fully as the same appears from records now in my office at Vinita.

Witness my hand and the seal of said Court at Vinita, this 15th day of November, 1907.

[SEAL.] CHAS A. DAVIDSON, *Clerk*,
By T. A. CHANDLER, *D. C.*

11 EXHIBIT "C."

Certified Copy of Judgment, Sentence, and Order of Commitment.

UNITED STATES OF AMERICA,
Indian Territory, Northern District, ss:

MONDAY MORNING, 9 O'CLOCK, *June 17th, A. D.* 1907.

Court met pursuant to adjournment.

Present The Honorable Joseph A. Gill, Judge of the United States Court for said District.

UNITED STATES
vs.
P. M. CHILDERS.

Indictment for Murder in the Indian Territory.

On motion of Wade S. Stanfield, Esq., Attorney for the United States Court for said District, the said defendant P. M. Childers

was brought to the bar of the Court in custody of the Marshal for said District, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the Jury in this cause on the 17th day of June A. D. 1907, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said:

Whereupon, The premises being seen, and by the Court well and sufficiently understood, it is considered by the Court here that the said P. M. Childers, for his crime aforesaid, be imprisoned in the penitentiary situated at Ft. Leavenworth, Kans., for the term and period of his natural life at hard labor and that he pay to the United States of America a fine of — together with all their costs in and about this prosecution laid out and expended, and that they have execution therefor.

It is further considered, That the Marshal of this Court in whose custody the said P. M. Childers is not here committed, receive and safely keep and convey the body of the said P. M. Childers hence to said penitentiary without delay, and deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep
12 the said P. M. Childers in said pentitentiary, in execution of the sentence aforesaid, and in conformity with the same, for the full period of the time aforesaid.

And it is further ordered, That the Clerk of this Court furnish the Marshal of this Court with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said penitentiary, and the other returned by the Marshal to this Court, with a full and true account of the execution of the same.

I, Chas. A. Davidson, Clerk of the United States Court in the Indian Territory, Northern District, hereby certify that the foregoing is a true and correct copy of the judgment, sentence, and order in the above entitled cause, as the same appears of record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Vinita, in said Indian Territory, this 17th day of June, A. D. 1907.

[SEAL.] CHAS. A. DAVIDSON, *Clerk*,
By E. B. DAVIDSON, *Deputy*.

Received, at the United States Penitentiary at Leavenworth Kansas, this 21st day of June, A. D. 1907, from William H. Darrough, Marshal of the United States for the Indian Territory, Northern District the body of the within named defendant P. M. Childers, together with a copy of this writ.

R. W. McCLAUGHRY, *Warden*.

I Certify that I have, in obedience to the within copy of judgment, sentence, and order of commitment, delivered the within named P. M. Childers, together with a copy of the within copy of judgment, sentence, and order of commitment, into the custody and hands of the Warden of the Penitentiary at Ft. Leavenworth, Kansas,

on the 21st day of June, A. D. 1907, and have his receipt
13 therefor endorsed thereon as within I am commanded.

W. H. DARROUGH,
U. S. Marshal for the Indian Territory, Northern District.
By H. B. DARROUGH, *Deputy.*

The conduct of the within named prisoner while in my charge has been good. Dated this 20th June, 1907.

A true copy.

J. C. WILKINSON, *Jailor.*
R. W. McCLAUGHRY, *Warden.*

Endorsed: *No. 992.* In Re P. M. Childers. Petition for Habeas Corpus. Filed Nov. 29, 1907. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk. O. L. Rider, Vinita, Ok. Attorney for Petitioner.

14 In the District Court of the United States, District of Kansas, First Division.

In re P. M. CHILDERS.

Stipulation.

It is hereby agreed between counsel for petitioner and counsel for the Government, that the presence of the petitioner at the hearing of this matter is waived, and the issuance and service of the writ asked for in said petition are also waived, and it is further agreed between said counsel that this matter shall be heard before the Hon. John C. Pollock, Judge of said Court, on the 19th day of December, 1907.

J. S. WEST,
Ass't United States Attorney.
O. L. RIDER,
Attorney for Petitioner.

Endorsed: No. 992. In Re P. M. Childers. Habeas Corpus. Stipulation. Filed Nov. 29, 1907. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

15 Be it remembered, That at the term of the District Court of the United States within and for the District of Kansas, First Division, begun and held at Kansas City in said District and Division, on Monday the 13th day of January, A. D. 1908, the following proceedings, among others, were had and appear of record in words and figures as follows:

No. 992.

In re P. M. CHILDERS.

Habeas Corpus.

MONDAY, *January* 13*th*, 1908.

Now on this day comes on for consideration the petition of P. M. Childers for writ of habeas corpus, and the Court having considered said petition together with the briefs of counsel herein, and being well advised in the premises, It is

Ordered, That said petition be and the same is hereby denied, to which order of the Court the petitioner excepts.

16 In the District Court of the United States for the District of Kansas, First Division.

No. 992.

In re P. M. CHILDERS, Petitioner.

Memoranda of Decision on Application for Writ of Habeas Corpus.

This is an application presented by P. M. Childers for writ of *habeas corpus*. The facts requisite to decision, are these:

Petitioner was presented to and indicted by a grand jury, duly empaneled in the United States Court for the Indian Territory Northern District, at its October 1905 Term of said court, held at Nowata, in said Territory, for the crime of murder, committed in the killing of one Lena Atwood on August 6, 1905, within the territorial jurisdiction of said court, as the same was established by act of Congress prior to the admission of that territory as a state.

Petitioner was thereafter at the June, 1907 term of said court put on his trial and convicted of the crime of murder. The jury making the recommendation "without capital punishment" he was by the Court on the 17th day of June, 1907, sentenced as follows: "To be imprisoned in the penitentiary situated at Fort Leavenworth, Kansas, for the term and period of his natural life at hard labor."

The petitioner now undergoing punishment in pursuance of the judgment of said court in the United States penitentiary at Leavenworth, this state, presents his petition for discharge based on two grounds: (1) That the grand jury which returned the indictment against him had no jurisdiction, power or authority to in-

17 quire into the offense charged against him, and for which he was tried and convicted; (2) that the court was without jurisdiction to impose the particular sentence imposed against him, and of these in their order.

The first ground is based on the peculiar provisions of the enabling act of Congress of June 16, 1906, providing for the establishment of courts and fixing their jurisdiction in the Indian Ter-

ritory under which this territory was finally admitted into the Union, November 16, 1907, on proclamation of the President, and particularly section 14 of said act, which reads, as follows:

"That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed, and all prosecutions for crimes or offenses committed before the passage of this act in which indictments have not yet been found or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed."

The contention made by petitioner on this branch of the case is this: That Congress by this act was fixing the jurisdiction of courts over offenses committed within the Indian Territory. That it might commit the indictment, trial and punishment of such offenders to any court of its creation in any state or territory of the United States, as might be deemed proper by Congress, and that it did in express language commit the punishment of all offenders where the offense was committed in the Indian Territory after the passage of this act, or of all offenders against the laws of the Territory whose offense was committed before the passage of the act, when at the date of the passage of the act indictment had not been returned, or other appropriate proceedings instituted, to the District Court for the Eastern District of Oklahoma provided for in section 13 of the act, after the state had been received into the Union under the terms of the
18 act, and such court should have been organized in accordance with its provisions, leaving the courts then established by the Congress in the Territory to proceed with the trial and disposition of only such cases as had been instituted by indictment or other appropriate proceedings under the law. Therefore, as in this case the crime charged was committed and this indictment returned after the date of the act, the court was without jurisdiction through its grand jury to inquire into the offense and the trial and conviction on such indictment was not due process of law.

It will be conceded if the United States Court for the Northern District of the Indian Territory did not have jurisdiction of the offense the indictment returned by the grand jury to that court would be void and any trial of petitioner on such indictment would not be due process of law, and the petitioner may be discharged from custody. Ex parte Farley, 10 Fed. 66.

The question, however, raised for determination is, did such court have jurisdiction of the offense for which petitioner was tried and convicted when such indictment was returned?

While the terms of the section above quoted leave ground for the argument made by petitioner, can it be thought to have been the intention of Congress to have left the Indian Territory after the passage of this act in such condition that no crime committed therein could be investigated or punished during the lapse of the seventeen months intervening between the passage of this act and the admission of the Territory as a state under it. Or, again, as the admission of the Territory as a state depended not alone on the will of the national government, as expressed by this act, but also on the will of the

electors of that Territory, and the Territory of Oklahoma as well, and the further condition of the approval of the constitution of said state by the President and his proclamation of admission, can it be thought if the people of the Territory had not seen proper
19 by the vote of its electors to have availed themselves of the benefits of this act, or had not adopted a constitution in such form as to have received the approval of the President, and thus the object of the act failed of completion, that all crimes committed therein in which the offender had not been indicted, or other appropriate proceedings taken against him at the date of the passage of this act, or all offenders against the laws of said Territory after the passage of the act should go unwhipped of punishment because the Congress had by the terms of this act destroyed the jurisdiction and power of its then existing courts to punish such offense. Surely, a construction fraught with such terrible consequences should not obtain here unless impelled beyond all reasonable doubt by language so clear and explicit as to admit of no other interpretation. In United States v. Kirby, 7 Wall. 482, Mr. Justice Field, speaking for the court, said:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

The application of the rule here announced has been made in a great many cases. Oates v. Bank, 100 U. S., 239; Lau Ow Bew v. U. S., 144 U. S. 47; Holy Trinity Church v. U. S., 143 U. S. 457; Lee Kan v. U. S., 62 Fed. 914; U. S. v. Hogg, 112 Fed. 909; Tsoi Sim v. United States, 116 Fed. 920.

The process of admission of a territory into the Union as a state requires the consent of both the national government through its legislative and executive branches, and the consent of the electors of the territory. Of necessity, such joint consent cannot be acquired without time intervening between the beginning and the accomplishment of such purpose. For the purpose of initiating the process of receiving the Indian Territory into the Union as a part of the state of Oklahoma, this act of June 16, 1906, was passed by the
20 Congress. As appears from its title and its face, the act was not one intended to be of positive present operation and effect as law only in so far as the Territories concerned might proceed thereunder to the preparation of a constitution and its adoption by the electors effected thereby. In other respects this enabling legislation of Congress remained in abeyance until the process of admission should ripen into the completed state by the proclamation of the President, or, until the process should prove abortive by the failure of the electors of the Territory to avail themselves of its provisions, or the refusal of the executive to approve the form of the constitution adopted by the electors of the Territory and issue his proclamation of admission. Hence, I am convinced, considering the entire act as a whole, while the language of section 14 is in terms a present

act, effective on its passage, yet, that the true intent of Congress was that the jurisdiction conferred by this section on the courts thereafter to be constituted in compliance with section 13 of the act, was neither intended to be nor was of present operation, but that the operation of this section remained in abeyance until the final admission of the Territory as a part of the state. That this is the true construction of the act becomes apparent by reference to the opening language of section 13, which provides, as follows:

"That said state when admitted as aforesaid, shall constitute two judicial districts, to be known as the eastern district of Oklahoma and the western district of Oklahoma; the said Indian Territory shall constitute said eastern district, the said Oklahoma Territory shall constitute said western district" etc.

From this and other language contained in the act, and from the object and purpose sought to be accomplished by it, I am of the opinion the true construction of section 14 of the act requires the holding that it was not a present vesting of judicial power, but a provision for the vesting of judicial power upon the happening of a certain contingency, that is, the actual admission of the Territory as a state, and the creation of the courts therein provided for on the happening of such contingency. That until such time, the
21 provision in question remained in abeyance. That the power and jurisdiction of the United States Court for the Northern District of the Indian Territory, through its grand jury therein empaneled, remained to inquire of the offense with which petitioner stands convicted, at the time such inquiry was made, that such court possessed full power and jurisdiction to try petitioner for such offense, and that such jurisdiction and power remained in said court to inquire into offenses committed in said Territory, cognizable by said court, after the passage of the act in question, until the admission of the state of Oklahoma became an accomplished fact.

As bearing upon this question in principle, see Freeborn v. Smith, 2 Wall. 160; Benner et al. v. Porter, 9 How. 235; Calkin and Company v. Cocke, 14 How. 237.

It is further contended by the petitioner, the court was without jurisdiction or power to impose the particular punishment imposed in this case. That the place of punishment should have been designated under the law as the "United States Penitentiary at Leavenworth, Kansas" instead of the "United States Penitentiary at *Fort* Leavenworth, Kansas."

It is conceded the proper designation of the place of punishment is as claimed by the petitioner, but as he is now incarcerated and undergoing punishment in the identical institution he would have been confined in had the designation been as he contends it should have been, and as required by the law, it is quite clear the rights of petitioner are not prejudiced thereby. There is no other institution answering to that name in the judgment, and the word "fort" therein may therefore be disregarded.

It follows, the writ prayed for by the petitioner must be and is denied.

JOHN C. POLLOCK, *Judge*.

Topeka, Kans., Jan'y 13th, 1908.

Endorsed: No. 992. In Re P. M. Childers. Habeas Corpus. Memoranda of Decision. Filed Jany. 13, 1908. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

22 In the District Court of the United States, Within and for the District of Kansas.

No. 992.

In re Petition of P. M. CHILDERS, for Writ of Habeas Corpus.

Petition on Appeal.

The above named petitioner, P. M. Childers, feeling himself aggrieved by the order and judgment entered on the 13th day of January, A. D. 1908, in the above entitled proceeding does hereby appeal from the said order and judgment to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

Signed this 12th day of February, 1908.

O. L. RIDER,
Attorney for Petitioner.

The foregoing claim of appeal is allowed as prayed for, this 28th day of February, 1908.

JOHN C. POLLOCK,
District Judge.

Endorsed: No. 992. In Re P. M. Childers. Petition on Appeal. Filed Feby. 28, 1908. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

23 In the District Court of the United States, Within and for the District of Kansas.

In re Petition of P. M. CHILDERS, for Writ of Habeas Corpus.

Assignment of Errors.

Comes now the petitioner herein, P. M. Childers, and files this his Assignment of Errors upon which he will rely in his appeal from the order and judgment made by this Honorable Court on the 13th day of January, A. D. 1908, in the above entitled cause, and says that there was committed error as follows:

1. The Court erred in denying petitioner's application for discharge.

2. The Court erred in deciding that the indictment on which petitioner was tried, convicted and sentenced was not void.

3. The Court erred in deciding that the United States Court for the Northern District of Indian Territory, in which petitioner was tried, convicted and sentenced, had jurisdiction of the crime charged in the indictment.

4. The Court erred in deciding that the proceedings by which petitioner was indicted, tried, convicted and sentenced in said United States Court for the Northern District of Indian Territory were due process of law.

5. The Court erred in deciding that petitioner was not held by said United States Court for the Northern District of Indian Territory to answer for a capital crime without presentment by a grand jury.

6. The Court erred in deciding that the particular sentence pronounced against petitioner by the United States Court for the Northern District of Indian Territory was not void.

24 7. The Court erred in deciding that the commitment under which petitioner is now held is not void.

8. The Court erred in deciding that the petitioner is not now deprived of his liberty without due process of law.

9. The Court erred in deciding that the confinement petitioner is now undergoing is a lawful restraint of his liberty.

10. The Court erred in not deciding that petitioner is now unlawfully restrained of his liberty.

11. The Court erred in deciding that the entire proceedings in the matter of the indictment, trial, sentence and commitment of petitioner were within the jurisdiction of said United States Court for the Northern District of Indian Territory and not illegal and void.

Wherefore petitioner prays that the order and judgment of the United States Court for the District of Kansas be reversed and that petitioner be discharged.

O. L. RIDER,
Attorney for Petitioner.

Endorsed: No. 992. In re P. M. Childers. Assignment of Errors. Filed Feby. 28, 1908. Morton Albaugh, Clerk. By F. L. Campbell, Deputy Clerk.

25 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Morton Albaugh, Clerk of the District Court of the United States of America for the District of Kansas, do hereby certify the within and foregoing to be a true, full and correct copy of the record and proceedings in said court in case No. 992, in the matter of the Application of P. M. Childers for a Writ of Habeas Corpus.

I further certify that the original Citation is hereto attached and returned herewith.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Topeka, in said District of Kansas, this 5th day of March, 1908.

[Seal of District Court U. S., District of Kansas, 1861.]

MORTON ALBAUGH, *Clerk.*
By ——— ———, *Deputy Clerk.*

Endorsed on cover: File No. 21,085. Kansas D. C. U. S. Term No. 110. P. M. Childers, appellant, vs. R. W. McClaughry, Warden of the United States Penitentiary at Leavenworth, Kansas. Filed March 28th, 1908. File No. 21,085.

110.

IN THE

UNITED STATES SUPREME COURT

October Term, 1908.

IN RE P. M. CHILDERS.

O. L. RIDER,
Attorney for Petitioner.

—— IN THE ——

UNITED STATES SUPREME COURT

October Term, 1908.

IN RE P. M. CHILDERS.

(No. 328)

MOTION TO ADVANCE CAUSE.

Comes now the petitioner herein, P. M. Childers, by his attorney, O. L. Rider, and moves the Court to advance this cause on the docket of this court for the October Term, 1908, and as reason therefor assigns the following:

This is an application for a writ of habeas corpus to discharge petitioner from confinement in the United States penitentiary at Leavenworth,

Kansas, where he is now, and since June, 1907, has been, confined by virtue of a commitment issued by the United States Court for the Northern District of Indian Territory on the 17th day of June, 1907. That your petitioner was indicted by a grand jury of said Northern District of Indian Territory on the 31st day of October, 1906, for the crime of murder. That the crime of which defendant was charged was committed on the 6th day of August, 1906. That petitioner was tried on said charge and on the 17th day of June, 1907, was found guilty, and sentenced to the United States penitentiary at Fort Leavenworth, Kansas, for the term of his natural life.

Petitioner shows in his application for said writ of habeas corpus that the confinement he is now enduring is unlawful and ~~unlegal~~ illegal for the following reasons:

1. That the said United States court had no jurisdiction of the offense of which he was convicted at the time the same is alleged to have been committed, or was in fact committed.

2. That said United States Court had no jurisdiction of said offense at the time said indictment

was returned against petitioner.

3. That said United States Court had no jurisdiction of said offense at the time petitioner was convicted and sentenced as aforesaid.

4. That the jurisdiction of said United States Court to indict petitioner for said offense, place him upon trial and sentence him therefor upon conviction was destroyed by the act of congress approved June 16th, 1906, and prior to the commission of said offense, and the indictment, trial, conviction, sentence and commitment of petitioner by said court was in excess of its authority and jurisdiction and therefore void.

5. That the grandjury which presented petitioner to said United States Court had no jurisdiction or authority to inquire into the offense of which petitioner was charged, or to return the indictment on which he was tried and convicted, and that said indictment was therefore void, and the act of said court in holding petitioner to answer said capital crime on said void indictment was in violation of Article five of the amendments to the Constitution of the United States in that it deprived petitioner of his right to be held to answer said charge on presentment or indictment by a grand jury.

6. That the restraint of your petitioner as aforesaid under said commitment issued as the result of said conviction on said void indictment is depriving him of his liberty without due process of law, in further violation of said Article five of said Amendments to the Constitution of the United States.

7. That at the time said sentence was imposed upon petitioner as aforesaid, said United States Court had no authority or jurisdiction under the law to commit petitioner to said United States penitentiary at Fort Leavenworth, Kansas.

8. That by order of the Attorney General of the United States, acting in conformity to law, made and entered prior to the sentence of your petitioner as aforesaid, and prior to the issuance of the commitment as aforesaid, and in full force at the time said sentence was imposed and said commitment issued, the United States penitentiary at Leavenworth, Kansas, had been designated as the place of confinement of prisoners of the class of your petitioner convicted by said United States Court, and said Court was without authority or jurisdiction to commit your petitioner to any other place of confinement than said United States peniten-

tiary at Leavenworth, Kansas. That the commitment by virtue of which your petitioner is now being detained in said United States penitentiary at Fort Leavenworth, Kansas, is therefore void.

For each and all of the reasons above set forth, petitioner shows to the Court that he is now being deprived of his liberty in violation of Article five of the Amendments to the Constitution of the United States, and that he is now entitled to his discharge by this court.

That your petitioner applied to the United States Court for the district of Kansas for a writ of habeas corpus to discharge him from said unlawful and illegal confinement, and said writ was denisd him on the 13th day of January, 1908. That his appeal from the action of said Court was duly docketed in this Court for the October Term 1907, (being case No. 582) on March 28, 1908. That said appeal was not reached for hearing and determination at said October, 1908, Term of this Court. This petitioner is now advised by the Honorable Clerk of this Court that his said appeal is numbered 328 on the docket of this Court for the October Term, 1908, and that, on account of the crowded condition of the docket of this Court, the same will

not be reached in any event before the month of April, 1909, and probably not before the October Term for the year 1909.

Wherefore petitioner prays that this cause may be advanced on the docket of this Court and that the same be set down and docketed for hearing at an early date.

O. L. RIDER,
Attorney for Petitioner.

No. 110.

In the Supreme Court of the United States

P. M. CHILDERS, *Appellant*,

vs.

R. W. McCLAUGHRY, Warden of the United States Penitentiary at Leavenworth, Kansas, *Appellee*.

BRIEF FOR APPELLANT.

O. L. RIDER,
Attorney for Appellant.

LUMAN F. PARKER, JR.,
Of Counsel.

Smith-Grieves Typesetting Co., 714-716 Baltimore, Kansas City, Missouri.

In the Supreme Court of the United States.

No. 110.

P. M. CHILDERS, *Appellant*,

vs.

R. W. MCCLAUGHRY, Warden of the United States Penitentiary at Leavenworth, Kansas, *Appellee*.

STATEMENT.

This proceeding involves the application to the case at bar of certain provisions of the act of Congress approved June 16th, 1906, admitting Indian Territory and Oklahoma Territory into the Union as one state, hereinafter referred to as the enabling act. Section 14 of that act, which is the pertinent one, is as follows:

> "Sec. 14. That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which com-

> mitted, and all prosecutions for crimes or offenses committed before the passage of this act in which indictments have not yet been found or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed."

The appellant was charged by an indictment returned into the United States Court for the Northern District of the Indian Territory on October 31st, 1906, with the crime of murder alleged to have been committed on August 6th, 1906; he was convicted of the charge in said court on June 17th, 1907, and on the same day sentenced to imprisonment in the United States penitentiary at *Fort Leavenworth* for the term of his natural life.

It will be observed the offense of which the appellant stands convicted was committed subsequent to the passage of the Act of June 6th, 1906, and therefore it is contended, being within one of the classes specified by Section 14, previously quoted, was made cognizable in the United States District Court created by that act when the same should be organized.

The enabling act was amended by an act of Congress approved March 4th, 1907, modifying somewhat the provisions of the original act respecting the jurisdiction of the courts in the proposed state, but this amendment was passed subsequent to the date the indictment was returned on which the appellant was tried.

At the time the appellant was sentenced, to-wit, on June 17th, 1907, the United States penitentiary at *Fort Leavenworth* was not the place of confine-

ment provided by law for persons convicted of murder in the United States Court for the Northern District of the Indian Territory.

Two questions are therefore presented by this record:

FIRST: Had the United States Court for the Northern District of the Indian Territory jurisdiction of this offense at the time the indictment was returned, to-wit, on October 31st, 1906?

SECOND: Can the appellant be lawfully confined under a sentence to a place of confinement other than that authorized by law?

We contend both of these questions should be answered in the negative.

BRIEF.

Respecting the first question, our discussion will embrace the following propositions:

(a) The peculiar situation in these two territories about to be united, of which this Court will take judicial notice, required appropriate treatment, and the plan adopted by Congress and clearly prescribed, whether the usual one or not, should be followed.

Act Jan. 6, 1883 (22 Stats., p. 400).
Act Mar. 2, 1889 (25 Stats., p. 786).
Act May 2, 1890.
Act Mar. 1, 1895.
Act June 28, 1898.
Ex parte Lane, 135 U. S., p. 443.

(b) Section 14 of the Act of June 16, 1906, in plain and positive language fixed the initiative jurisdiction of the United States Courts created thereby as of the date of the passage of the act, their powers being held in abeyance, however, until the state should be admitted.

Sections 13-21, inclusive.
Benner v. *Porter*, 9 How., p. 119.
In re Johnston, 167 U. S., p. 103.
Manley v. *Olney*, 32 Fed. Rep., p. 709.

(c) That jurisdiction embraced all crimes and offenses against the laws of the United States.

Sections 14, 16.

(d) The offense for the commission of which the appellant stands charged was one against the dignity and laws of the United States.

Secs. 16 and 14, Act June 16, 1906.
Sec. 5339, R. S. U. S.
Record, p. 5.
U. S. v. *Snow*, 18 Wall., p. 319.
U. S. v. *Clark*, 46 Fed. Rep., p. 637.
U. S. v. *Baum*, 74 Fed. Rep., p. 43.

(e) The power of Congress to make such provision as it might deem proper respecting the jurisdiction of the courts of its creation and the trial and disposition of offenses against the laws of the United States has been repeatedly recognized.

Sheldon v. *Sill*, 8 How., p. 449.
Jones v. *U. S.*, 137 U. S., p. 202.
Cook v. *U. S.*, 138 U. S., p. 157.
Endleman v. *U. S.*, 86 Fed., p. 456;—
2 Dill., p. 229.
Benner v. *Porter*, 9 How., p. 119.
Clinton v. *Englebrecht*, 13 Wall., p. 434.
Koenigsberger v. *Richmond*, 158 U. S., p. 48.
U. S. v. *Baum*, *supra*.

(f) The provisions of this act on the subject of jurisdiction are too plain to admit of any other construction than that which the ordinary meaning of the words suggest, and should have been followed by the court below regardless of its view of what Congress should or should not have done, or the consequences that might flow from its action.

Bacon's Abridg., Sec. 2.
Hamilton v. *Rathbone*, 175 U. S., p. 419.
Platt v. *U. P. Ry.*, 99 U. S., p. 58.

U. S. v. *Temple*, 150 U. S., p. 99.
In re Mayfield, 141 U. S., p. 107.
U. S. v. *Folsom*, 160 U. S., p. 121.
Montclair v. *Ramsdell*, 107 U. S., p. 152.
Allen v. *La.*, 103 U. S., p. 85.

Upon the second question suggested, we respectfully submit:

(g) The sentence of the appellant to a place of imprisonment not authorized by law is void.

Church on Habeas Corpus, Secs. 362, 351.
In re Neilson, 131 U. S., p. 176.
In re Mills, 135 U. S., p. 263.
In re Bonner, 151 U. S., p. 242.
In re Medley, 134 U. S., p. 160.
In re Christian, 82 Fed., p. 204.
Ex parte Moon Fook, 72 Cal., p. 10.
Ex parte Sylvester, 81 Cal., p. 199.
Shepherd v. *Com.*, 2 Met. (Mass.), p. 419.
Elliott v. *People*, 13 Mich., p. 365.

(h) The marshal under the mittimus issued to him had no authority to deliver the prisoner to anyone save the keeper of the penitentiary at Fort Leavenworth, Kansas, and the restraint of appellant by the respondent under said sentence and mittimus is wrongful.

Hale's P. C., p. 433.
Kerr on Homicide, p. 9.
In re Bonner, supra.
In re Christian, supra.

THE FIRST QUESTION.

Argument.

It need not be stated before this Honorable Court that conditions in the Indian Territory have been anomalous and unprecedented. Respecting the distribution of judicial power and authority, with which we now have to do, they were especially so.

Originally set apart by treaty stipulations as the home of what are known as the Five Civilized Tribes of Indians, it was for a long time occupied by Indians exclusively, and by solemn treaty it was promised that they should never be included within the limits of any state without their consent. Each of the tribes was a limited sovereignty within its borders, having exclusive jurisdiction over its own people and their property. Then the white man came. An intruder at first, but, by long acquiescence on the part of the Indians, an occupant, and finally a recognized resident and citizen. At an early day questions began to arise not properly cognizable by the Indian tribunals. This situation called from Congress the first legislation respecting the jurisdiction of the United States, and the Federal Courts, first of Arkansas, then of Kansas and Texas, were given certain jurisdiction over persons and property in the Indian Territory ancillary to the ordinary powers

and jurisdiction possessed by those courts, respectively.

R. S. U. S., Sec. 533.
Act Jan. 6, 1883 (22 Stats., p. 400).

This did very well for a time, but Congress finally saw the necessity of providing a special local tribunal, and the United States Court for the Indian Territory was created with jurisdiction over certain crimes against the laws of the United States, not punishable by death or hard labor. (Act March 1, 1889; 25 Stats. at L., p. 786.) The Indian tribunals retaining jurisdiction of all cases, both civil and criminal, where members of the Tribe alone were involved, and the Federal Courts of Arkansas, Kansas and Texas continuing to exercise jurisdiction over those charged with the commission of capital and otherwise infamous crimes committed in said territory.

On May 2d, 1890, by an act of Congress, the Territory of Oklahoma was carved out of this jurisdiction and an organized government provided therefor. All that part not included in the Territory of Oklahoma continued to be known as the Indian Territory, and by that same act the jurisdiction of the United States Court established by the Act of March 1, 1889, was enlarged and certain parts of the Arkansas Code put in force therein; but jurisdiction over crimes punishable by death or imprisonment at hard labor was still denied the court in the Indian Territory, and continued to be exercised by the Federal Courts of the adjoining states.

By the Act of March 1, 1895, it was provided that on and after September 1, 1896, the United

States Courts in the Indian Territory should have exclusive jurisdiction of all crimes against the laws of the United States in force therein, of which the United States District Courts for Kansas, Arkansas and Texas had not acquired jurisdiction before that date, and the criminal laws of Arkansas were again extended over said territory as a part of the laws of the United States. On June 28, 1898, the act, so-called "The Curtis Bill," was passed, abolishing the Indian tribunals, transferring all causes pending therein to the United States Courts, and shaping up matters generally for statehood.

The Arkansas Code came into the Indian Territory as a part of the laws of the United States, and so it ever remained. To the extension of these laws and their enforcement as a part of the laws of the United States is largely due the unique situation that subsequently prevailed. The Federal statutes and the laws of Arkansas became the local laws of these people; Congress the sole legislative body; and the United States Courts the forum in which was cognizable both state and federal matters, as those terms are generally used. With no local government whatever, the Indian Territory never ceased to be an "unorganized territory" under the exclusive jurisdiction of the United States. All of its laws were federal laws, strictly speaking, and all offenses committed therein were federal offenses.

In the Territory of Oklahoma the situation was entirely different. By the Act of May 2d, 1890 (*supra*), a local government was established. It had a Legislature discharging the duty of providing local laws as distinguished from those purely federal. Matters of ordinary state and federal cognizance fell

apart. By the laws of the territory was meant the acts of her Legislature, and by the laws of the United States was meant the acts of Congress. This division of jurisdiction was clearly defined and the procedure entirely separate.

This was the situation in the two territories respecting jurisdiction at the time of the passage of the "Enabling Act," June 16th, 1906. Springing from the same parent stock—the Act of March 1, 1889—they were now to be united as one state. Oklahoma with her organized government, her local laws, and her territorial institutions, and the Indian Territory with her acts of Congress and big United States Court.

With full knowledge of this situation, Congress provided by said Enabling Act:

> "Sec. 13. That said state when admitted as aforesaid shall constitute two judicial districts, to be known as the eastern district of Oklahoma and the western district of Oklahoma; the said Indian Territory shall constitute said eastern district, and the said Oklahoma Territory shall constitute said western district."
>
> "Sec. 14. That all prosecutions for crimes or offenses *hereafter committed* in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed, and all prosecutions for crimes or offenses committed *before the passage of this act* in which indictments have not yet been found or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed."
>
> "Sec. 16. That all causes pending in the supreme and District Courts of Oklahoma Territory and in the United States Courts and in

the United States Court of Appeals in the Indian Territory arising *under the Constitution, laws, or treaties of the United States,* * * * shall be transferred to the proper United States Circuit or District Court for final disposition."

"Sec. 19. The courts of original jurisdiction of such state shall be deemed to be the successor of all courts of original jurisdiction of said territories * * *."

"Sec. 20. That all cases pending in the District Courts of Oklahoma Territory and in the United States Courts for the Indian Territory at the time said territories became a state not transferred to the United States Circuit and District Courts in the State of Oklahoma shall be proceeded with, held, and determined by the courts of said state, the successors of said District Courts of the Territory of Oklahoma and United States Courts for the Indian Territory, etc."

"Sec. 21. * * * Such state government shall *remain in abeyance* until the state shall be admitted into the Union and the election for state officers held, as provided for in this act. * * * And the officers of the state government formed in pursuance of said constitution, as provided by said constitutional convention, shall proceed to exercise all the functions of such state officers; and all laws in force in the Territory of Oklahoma at the time of the admission of said state into the Union shall be in force throughout said state, except as modified or changed by this act, or by the constitution of the state, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States."

The appellant rests his claim to a discharge upon the proper construction of Section 14, and believes it cannot be disputed that the "crimes and offenses"

referred to therein are those of a federal character in the sense of the whole act, and were intended to be so regarded after June 16th, 1906, and, also, that, regardless of whether the crimes and offenses committed in Indian Territory after the passage of the act might ordinarily, or elsewhere, be considered of state cognizance, Congress in this instance, acting within its constitutional limits, and presumably for ample cause, clearly and specifically provided that such offenses should be cognizable in the court created by that act.

Whether Section 14 be considered alone, or in connection with the other provisions, the plain intent of Congress is equally manifest. The section itself is clear and unambiguous, and its meaning is emphasized when considered with other provisions of the act.

Congress, in the plainest of language, separated matters of federal from those of state cognizance. Those "arising under the Constitution, laws, or treaties of the United States" are federal matters. (Section 16, *et seq.*) All others are state matters. United States Courts are established by Section 13; their initiative jurisdiction provided for by Section 14; and pending causes transferred by Section 16. Initiative jurisdiction relates back to June 16th, 1906, and jurisdiction over pending cases dates from the admission of the state. The powers and jurisdiction provided for are to remain in abeyance until the state is admitted (Section 21) and in the *interim* the old territorial courts grind away on pending cases, without any power to initiate new proceedings.

The Plan An Original One.

Upon the admission of no other state, beginning with Vermont (1791), and including Utah (1896), has any reference whatever been made in the acts of Congress to the trial or disposition of indictments for crimes or offenses "in which indictments have not yet been found," and therefore not pending at the time of the admission of the state. The provision embodied in Section 14 is of special significance and indicates the purpose of Congress to provide in this instance for the unusual legislative situation with which it was confronted in the Indian Territory.

Considering the act in order to determine the jurisdiction of the United States Courts created thereby, the inquiry naturally arises, what matters are of *federal cognizance* within the meaning of the act? What crimes or offenses are cognizable in the District Court of the United States for the Eastern District of Oklahoma? Clearly those "arising under the Constitution, laws, or treaties of the United States," etc. The spirit of all the provisions respecting jurisdiction show this, and Section 16 shows it specifically. This section has reference exclusively to the jurisdiction of the federal courts created by that act.

Section 14, when extended, would read:

> "That all prosecutions for crimes and offenses arising under the Constitution, laws, or treaties of the United States *hereafter committed*," etc., "shall be cognizable," etc.

The initiative jurisdiction therein conferred dates from June 16, 1906,—the date of the act. The use of the words "hereafter committed," and those "committed before the passage of this act in which indictments have not yet been found," fix that as the date beyond all question. The power of the courts to exercise that jurisdiction was to remain in abeyance until they were organized upon the admission of the state.

Benner v. *Porter*, 9 How., 119.
In re Johnston, 167 U. S., 103.

Had Congress intended that the jurisdiction conferred by Section 14 should date from the admission of the state, how simple it would have been to have said so. Surely such a future tense cannot be inferred from the language used.

The Course Pursued in Other States.

An examination of the various acts of Congress providing for the admission of other states into the Union discloses almost identical provisions respecting the general jurisdiction of the federal and state courts and the division of federal from state matters (with the exception of the Indian Territory-Oklahoma Act). No reference, however, is made to non-pending cases, but the criterion as to what is to be considered matters of federal and state jurisdiction, respectively, save the exception above noted, is the same, to this effect:

" * * * that in respect to all cases, proceedings and matters now pending * * * and arising within the limits of any such state, whereof the Circuit and District Courts by this act established might have jurisdiction under the laws of the United States had such court existed at the time of the commencement of such cases, the Circuit and District Courts, respectively, shall be the successors of said Circuit and District Courts in said territory; and in respect to all other cases, proceedings and matters pending * * * the courts established by said state shall respectively be the successors of said District and Circuit Territorial Courts. * * *"

Act Feb. 22, 1889 (25 St. at L., 682), admitting North Dakota, South Dakota, Montana, and Washington.
Act Feb. 27, 1865 (13 St. at L., 440), admitting Nevada.
Act July 3, 1890 (26 St. at L., 215), and others.

The Oklahoma Plan Was Different Because All Indian Territory Offenses Were Federal.

Notwithstanding a long line of precedents in similar instances, which had received judicial construction, Congress, for reasons of its own, provided a different criterion for determining the jurisdiction of federal and state courts in the State of Oklahoma. The Act of June 16, 1906, does not confine the jurisdiction of the federal courts to that class of cases whereof such courts might have had jurisdiction had they arisen within a state; but it is specifically provided that the jurisdiction of these courts shall extend to all cases arising under the "Constitution,

laws and treaties of the United States," which would include every offense committed within the Indian Territory. Moreover, in the Indian Territory-Oklahoma enabling act, as before said, for the first time in the history of such legislation, Congress provided a jurisdiction over offenses for which no indictments had been returned. That jurisdiction was vested in the federal courts within said state. To meet this situation, the new division between matters of state and federal cognizance became necessary.

The laws in force in the Indian Territory being laws of the United States, they were more properly enforcible in the Courts of the United States. Had Congress intended otherwise, it would have continued those laws as the local laws for that part of the new state formerly known as Indian Territory, until the state Legislature might otherwise provide, just as it did in the very same act in providing for the admission of Arizona and New Mexico. The laws of New Mexico were continued for one part of the proposed state and the laws of Arizona for the other. (Sec. 40, Act June 16, 1906.)

Congress must have had in mind that the conditions in the Indian Territory were entirely different from those in Oklahoma Territory to which it was to be joined. Legislation enough respecting the Indian Territory as a country separate and distinct and within the exclusive jurisdiction of the United States has been enacted to warrant this assumption. Congress must have known that all of our laws were laws of its own making; that every right was a right, and every crime was a crime therein by virtue of some law of the United States, and therefore cognizable in the courts of the United States.

That it was so understood and intended by Congress becomes more positively apparent when reference is made to the amendment of this enabling act, approved March 4, 1907, wherein it is provided by the last paragraph of Section 1 that matters of federal cognizance shall be those "*which, had they been committed within a state, would have been cognizable in the federal courts,*" thus modifying the original provision and re-establishing the criterion which had obtained upon the admission of other states. Why this was done cannot, of course, be known; but it may be presumed that the subject was presented to Congress in such a way as to show that less difficulty would be encountered by adhering to the old method of division than by retaining in federal courts jurisdiction of all causes that may have arisen under the Constitution, laws and treaties of the United States. In any event, it required new legislation to effectuate the change.

Inasmuch as all crimes and offenses in the Indian Territory arose "under the laws of the United States," it must follow that, on the date the indictment herein was presented, jurisdiction over all crimes committed therein after June 16, 1906, or prior to that date where no indictments had been found, was lodged by the Enabling Act in the federal courts as therein constituted. Such is the plain declaration of Congress. The fact that no provision or exception is made whereby the state courts may enforce those special laws of the United States in force in the Indian Territory alone, some of them taken from the laws of Arkansas, under which the majority of the prosecutions in the Indian Territory arose, strengthens this position. The power was specifically

conferred upon the State of Oklahoma by said Section 21 to enforce all the laws of the Territory of Oklahoma, except as modified or changed by the Enabling Act or the Constitution to be formed thereunder; but there is no saving clause as to those laws, general or special, of Congress respecting nonpending offenses committed in the Indian Territory, unless it be held that the jurisdiction conferred upon the federal courts provided a forum authorized to enforce the laws applicable to these cases, and in force at the time the offense was committed.

The amendment to the Enabling Act above referred to, while adding force to our position, showing, we believe, a legislative construction of the original act, cannot affect the indictment herein for the reason that it was adopted subsequent thereto. It may be that this amendment established a new line of division between state and federal matters, and that thereby the initiatory jurisdiction of the old United States Courts was revived. It is unnecessary, however, to discuss that matter here, because, even if such were true, it could not validate the indictment on which appellant was convicted. That indictment was returned *after* the passage of the original Enabling Act and *before* this amendment. No revival of jurisdiction could cure that indictment. It was utterly void for want of jurisdiction in the court which returned it. Possibly, after the amendment, if the effect thereof was as suggested, a new indictment might have been returned against the appellant and jurisdiction acquired; but this was not done.

If the appellant committed the crime charged, it was and is a federal offense, denounced by Section

5339 of the Revised Statutes of the United States. The indictment so charged and any indictment returned would necessarily do likewise.

See cases cited in brief.

As said before, we do not contend that the courts provided for in the Enabling Act actually assumed jurisdiction on June 16, 1906. Those courts are thereby created, but their powers, together with the powers of the other machinery provided for, are held in abeyance until the date of the admission of the state. The initiative jurisdiction of the courts of the territories respecting offenses arising under the Constitution, laws or treaties of the United States is, by Section 14, taken away and vested in the courts created by this act.

It was suggested in the argument below that surely Congress did not propose to suspend the institution of prosecutions indefinitely. The answer to this is plain. To meet the peculiar conditions existing in the Indian Territory, or to relieve the courts thereof on the eve of their dissolution, or for some other sufficient reason, Congress took away from them the power to initiate prosecutions for offenses arising under the Constitution or treaties of the United States after that date. Perhaps at the moment, Congress was unmindful of the fact that the usual legal separation between matters of state and federal cognizance did not prevail in Indian Territory. There is no ground, however, to assume that Congress intended or expected this to last indefinitely. When the conditions warranted it, the power existed by supplemental legislation (as was in fact enacted) to revive their

jurisdiction or to confer it elsewhere. If matters of policy, however, are to be considered by the court, it might be proper to suggest that the method of postponement for a few months contemplated by Congress in this instance is certainly less deplorable than that of permitting the territorial tribunals to initiate proceedings up to the day of statehood and then give immunity to all offenders who had escaped indictments those courts, as occurred on the admission of other states. The provisions of this act are quite different from other Enabling Acts and in many respects more comprehensive. Whether they were in all the respects the best, it is not for us to inquire. That responsibility rests with Congress.

It was the duty of the Court to give effect, if possible, to every clause and word of the statute and avoid any construction which implies that the Legislature was ignorant of the meaning of the language employed. We should assume the Legislature was familiar with the conditions and aware of the results to follow.

It has been frequently held by this Court when a territory is admitted as a state that matters of federal cognizance are such as Congress in its judgment may declare the federal courts shall assume; that courts of the United States inferior to the Supreme Court have only such jurisdiction as Congress may confer; and that Congressional action is necessary to enable those courts after the admission of the state to even take jurisdiction of cases previously commenced, although they may have arisen under the laws of the United States.

Recognizing the peculiar conditions here, it is but a natural and proper inference that in enacting

the provisions respecting jurisdiction Congress intended to meet such conditions. And as stated in *Manley* v. *Olney* (32 Fed., p. 709), this rule applies with increased force where there is an express provision as to a certain class of cases which otherwise would be swept away, and which theretofore had never been provided for.

Jurisdiction of Territorial Courts Curtailed.

The language of Section 14 is: "* * * all prosecutions for crime or offenses hereafter committed * * * and all prosecutions of crime or offenses committed before the passage of this act in which indictments have not yet been found * * * " shall be cognizable in the courts created by that act. Clearly the initiative jurisdiction is taken away from the territorial courts and conferred upon the courts created by that act. It cannot be reasonably argued that jurisdiction of those cases was left in the territorial courts and at the same time reserved from the date of that act to the courts created therein. The jurisdiction cannot be regarded as concurrent. It is in every sense of the word a succeeding jurisdiction. When one attaches the other terminates.

It is a settled rule that if a law conferring jurisdiction is repealed or superseded, jurisdiction of cases is gone.

Manley v. *Olney*, 32 Fed., p. 709.
Insurance Co. v. *Riche*, 5 Wall., p. 541.
Ex parte McCardle, 7 Wall., p. 514.
U. S. v. *Tynen*, 11 Wall., 88.
R. R. v. *Grant*, 98 U. S., 398.

Where two acts are in conflict, the latter repeals the earlier act, even though there be no expressed repeal.

> *U. S.* v. *Fisher*, 109 U. S., p. 145, and cases cited.

This act clearly repealed the provisions of any prior act respecting jurisdiction of the cases mentioned in Section 14.

> *U. S.* v. *McBratney*, 104 U. S., p. 623.
> *Draper* v. *U. S.*, 104 U. S., p. 240.
> *Ex parte Larkin*, — L. R. A., 478.

As said by this court in *Ins. Co.* v. *Richie*, 5 Wall., 544, where a jurisdiction is conferred and then taken away, all cases fall—and this is true even when it is difficult to prescribe a reason for the act, the court saying, "for when the terms are unambiguous we may not speculate on probabilities of intention."

> *Ex parte McCardle*, 7 Wall., p. 506.
> *Farley* v. *Wilson*, 40 Fed., p. 66.

The Power of Congress.

The United States Court for the Northern District of the Indian Territory which assumed jurisdiction over this cause was a special tribunal created by Congress with certain specified jurisdiction. Congress having conferred it, it had the power to take it

away, or make such alterations therein as it might see fit.

> "Having the right to prescribe, Congress may, of course, withhold, confer or withdraw from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction withheld from it, or conferred upon another."
>
> *Sheldon* v. *Sill*, 8 Howard, p. 449.
> *Clinton* v. *Englebrecht*, 13 Wall., p. 434.

The Indian Territory Court did not acquire jurisdiction by the mere commission of the offense.

> *Ex parte Johnston*, 167 U. S., p. 120.

Congress could have designated any forum it saw fit for the trial of petitioner herein.

> *U. S.* v. *Dawson*, 15 How., 602.
> *Cook* v. *U. S.*, 138 U. S., 157.

We think it quite clear that the acts of Congress conferring initiative jurisdiction upon the Indian Territory courts were superseded as to those crimes and offenses specified in Section 14 of the Enabling Act. This being true the territorial court had thereafter no authority to return the indictment herein or render a judgment. It would not have made any difference at what point in the progress of the cause the act took effect, Congress having so provided, jurisdiction ceases immediately thereon.

> *Ex parte McCardle*, *supra*.
> *U. S.* v. *Baisdore's Heirs*, 8 How., 121.

The power of Congress to confer upon the courts of its creation an initiative jurisdiction antedating their assumption of powers was not seriously contested; but it was urged below that Congress could not have intended to do so unusual a thing as to invest the United States District Courts in Oklahoma with jurisdiction over all offenses committed after June 16, 1906, when many of them would have been properly cognizable in the state courts had a state existed at the time they were committed.

We have already called the attention of the Court to the distinction between the provisions respecting jurisdiction in the original Oklahoma Act and other Enabling Acts, and have urged that it must have been to meet the peculiar conditions in the Indian Territory that Congress in this instance made a different criterion as to federal and state matters. The argument that the jurisdiction thus conferred is unusual and exceptional is of no avail if it appears that Congress has so provided. It may be unusual, but it is not without precedent.

Cook v. *U. S.*, *supra.*

It was suggested below that by the construction contended for Congress conferred by this act a jurisdiction upon the Circuit and District Courts of Oklahoma different from that given to any like court upon the admission of a state.

An examination of legislation respecting conditions in territories at the time, and subsequent to their admission into the Union of States, shows that the conferring of special powers and extraordinary jurisdiction upon the Federal courts has frequently been necessary.

The acts of Congress conferring jurisdiction upon the Federal courts of the adjacent states set forth at the beginning of this argument is a striking instance, not only of an unusual jurisdiction conferred, but a distinct recognition of a peculiar and unusual situation existing in this territory.

Forsyth v. *U. S.*, 9 How., 574, presents a case growing out of conditions peculiar to the then Territory of Florida. Congress conferred upon the Supreme Court of the United States jurisdiction to hear cases appealed from the Territorial Court of Appeals after Florida had become a state without limitation as to the amount in controversy, or whether the cause be of a civil or criminal nature. And this conclusion of the court was based largely upon the fact that the other sections of the enabling act having made ample provision for all other classes of cases, it was evidently the intent of Congress by the special provision of the section under consideration to so provide.

Section 6, Act of Congress of Feb. 22, 1847 (*supra*), is an instance in point. There the United States District Court for the State of Florida was invested with all the powers and duties of the judge of the Territorial Court and directed to hear all matters remaining undisposed of before that court.

Another instance of the exercise by Congress of its power to meet peculiar and unusual conditions is found in the Act of Feb. 2, 1819, where *jurisdiction in admiralty* was conferred by an act of Congress upon justices of the peace of Florida. *American & O. Ins. Co.* v. 356 *Bales*, 1 Pet., p. 511.

See also *In re Mayfield*, 141 U. S., p. 107.
Folsom v. *U. S.*, 160 U. S., p. 121.

In many of the enabling acts a special authority has been likewise conferred upon Circuit and District Courts of the United States to assume jurisdiction and dispose of cases pending *on appeal in the Supreme Courts* of the territory, and it has been frequently held there was no inconsistency in so doing, and that the new Federal courts should proceed the same as if the Territorial Supreme Courts had retained jurisdiction.

Bates v. *Payson*, 4 Dill., 265.
Koenigsberger v. *Richmond, etc.*, 158 Sup. Ct., p. 49.

We only refer to these to show that even if it be conceded that the provisions of the original act under consideration, as we construe it, conferred a jurisdiction upon the United States Courts different from that provided on the admission of many states, it readily appears Congress has not hesitated in the past to confer unusual and special powers and jurisdiction on United States Courts elsewhere, when in its judgment the situation required it.

Judge Pollock's Opinion.

In the opinion of the court below denying this application it is conceded that Section 14 by its terms is a present act—effective on its passage—but the court declined to accept the interpretation advanced for reasons therein given, laying special stress upon the "terrible consequences" which the court conceived would result from doing so. Consequences which, as we shall undertake to show,

could not possibly follow. We are confident, if this apprehension of the court, subsequently aroused, could have been foreseen and shown to be unfounded, and that, in truth, the granting of this writ would have permitted no one—no, not even the appellant—to go "unwhipped of punishment" if guilty, and properly tried, that our contention would have been received with more favor.

That the court below did consider the results which it conceived would ensue as bearing upon the question as to how the act should be construed appears, we believe, quite clearly in the opinion. There may be instances where such considerations ought to be taken into account, but we submit that this is not one of them. It is perfectly well settled that where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may consider extraneous circumstances and the results that might flow from a strict or a liberal construction; but where the act under consideration is clear upon its face, and is fairly susceptible of but one construction, that construction should be given to it regardless of the results which may follow.

> See *Hamilton* v. *Rathbone*, 175 U. S., p. 419, and cases cited.
> *Platt* v. *Union Pac. R. R.*, 99 U. S., p. 58.
> *U. S.* v. *Bailey*, 24 Fed. Cases, No. 14495.

As tersely stated by this Court in *U. S.* v. *Temple*, 150 U. S., at page 99:

> "Our duty is to read the statute according to the obvious import of the language used, without resorting to subtle or forced construc-

tion for the purpose of either limiting or extending its operations, for such would be to make the law and not to construe it."

And again in *Montclair* v. *Ramsdell*, 107 U. S., p. 152:

"It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language employed."

Mr. Bacon in his Abridgment, Section 2, gives it as a cardinal rule that

"A statute ought upon the whole to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant."

Whenever Congress has conferred a power, or made an exception in clear and plain terms, effect has always been given thereto by this Honorable Court, whatever the result might be. Numerous instances might be cited. A few only will be referred to briefly.

In re Mayfield, 141 U. S., p. 107, was a case where the defendant was convicted in the United States Court having jurisdiction at that time over the Indian Territory of the crime of adultery in violation of the laws of the United States. The defendant was a Cherokee. The Cherokee Nation had no law punishing the crime. The case turned upon the construction of this provision of a treaty:

"The Cherokees also agree that a court or courts may be established by the United States in said territory, with such jurisdiction and or-

> ganized in such manner as may be prescribed by law; *Provided*, that the judicial tribunals of the (Indian) Nation shall be allowed to retain exclusive jurisdiction in all civil and criminal cases arising within their own country in which members of the Nation by nativity or adoption shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, except as otherwise provided by law."

The court below held that before the rights recognized in the proviso vested, the court or courts of the United States authorized by the principal part of the article must have been actually established and organized. This Honorable Court rejected that view, holding it to be unnecessary that the courts should have been established or organized, thereby giving full effect to the proviso curtailing the jurisdiction of the United States District Court of Arkansas, and, holding that that court had no jurisdiction, discharged the defendant, although it was perfectly clear that he could never be brought to trial elsewhere for the crime.

Another instance, involving the question of jurisdiction, may be found in the case of *Folsom* v. *U. S.*, 160 U. S., p. 121, wherein it is held that the construction placed upon the statute under consideration was imperative from the language used by Congress, and that they were not at liberty to consider the results, the court saying:

> "It is said that this involves the absurdity that convictions for minor offenses are reviewable on a second appeal, while convictions for capital and infamous crimes are not. Doubtless in some cases where the language of a statute leads to an absurdity, hardship or injustice, pre-

> sumably not intended, a construction may be put upon it modifying the meaning of the words so as to carry out the real intention, but where the intention is plain it is the duty of the court to expound the statute as it stands. * * * It may be that there was an oversight in that particular, but if there were, we certainly cannot supply it by construing the Fifteenth section as carrying appellate jurisdiction in such cases. * * *"
>
> See also *Platt* v. *U. P. R. R.*, 99 U. S., p. 58.
> *In re Medley*, 134 U. S., p. 160.
> *In re Savage*, 134 U. S., p. 176.

In view of the position we shall take, these citations are unnecessary, perhaps, but we felt called upon to mention them in response to what is said in the opinion of the lower court.

The application herein is not made to defeat the ends of justice. The appellant has no other expectation than that he will be tried again. He simply insists he was not tried upon a valid indictment, and is being held, without warrant, upon a void sentence. In other words, he is contending for a right, guaranteed to him and every other man by the Constitution; a right so sacred, as has often been said by this Court, that the exigencies of no situation will permit it to be infringed upon in the slightest degree.

We stated that the consequences predicted by the lower court could not possibly transpire. Let us see.

The learned district judge in the case at bar says:

> "While the terms of the section above quoted leave ground for the argument made by petitioner, can it be thought to have been the

> intention of Congress to have left the Indian Territory after the passage of this act in such condition that no crime committed therein could be investigated or punished during the lapse of the seventeen months intervening between the passage of this act and the admission of the territory as a state under it?"
>
> Record, p. 14.

We respectfully insist the situation should be considered as it was presented to Congress at the time this act was passed. The circumstance that seventeen months did elapse is no evidence that Congress, in making this provision, contemplated that so long a time would intervene. There was no occasion to apprehend that there would be any considerable delay in organizing these territories into a state. Of course, a reasonable lapse of time was to be anticipated, and the enactment of this specific provision, under the circumstances, warrants the assumption that Congress intended no indictments would be returned for a short interval, but was prepared to exercise its reserve power, and by supplemental legislation meet any unusual situation or unreasonable delay. In fact, such supplemental legislation was enacted within a few months thereafter. (Act March 4th, 1907, *supra.*) The purpose of Congress as expressed in said Section 14 being so plain, should we not conclude that the intention was to suspend the institution of new prosecutions until the state was admitted? If Congress saw proper to do this, what harm could result? Few prosecutions are initiated and fewer still concluded within the brief space of time it was anticipated would be required to organize this state under the act.

Quoting further from the same opinion:

> "Or, again, as the admission of the territory as a state depended not alone on the will of the national government, but also on the electors of that territory, and the Territory of Oklahoma as well, and the further condition of the approval of the Constitution of said state by the President and his proclamation of admission, can it be thought if the people of the territory had not seen proper by the vote of its electors to have availed themselves of the benefits of this act, or had not adopted a constitution in such form as to have received the approval of the President, and thus the object of the act failed of completion, that all crimes committed therein in which the offender had not been indicted, or other appropriate proceedings taken against him at the date of the passage of this act, or all offenders against the laws of said territory after the passage of the act should go unwhipped of punishment because the Congress had by the terms of this act destroyed the jurisdiction and power of its then existing courts to punish such offenses. Surely, a construction fraught with such terrible consequences should not obtain here unless impelled beyond all reasonable doubt by language so clear and explicit as to admit of no other interpretation."

In reaching the conclusion above quoted that by failure of statehood many guilty men would go unpunished, the court seems to have lost sight entirely of the power of Congress by supplemental legislation to make ample provision to meet the situation he suggests, as well as the assumption of jurisdiction by the state under the amendment of March 4, 1907.

The act under consideration and similar legislation of Congress assumes that the object it has in

view will be attained. Congress clearly intended these territories should be speedily admitted as a state, and this act was framed to carry out that intention. It would have been confusing to incorporate in such legislation alternative provisions. We frequently find instances where Congress has made positive provisions respecting matters based upon certain facts or a particular hypothesis, and later, the situation being changed, or for other cause, corrective legislation became necessary. Situations almost identical and quite as serious as that supposed by the court have existed on the admission of many states and have been successfully and satisfactorily met by subsequent legislation.

> "When Congress has passed an act admitting a territory in the Union as a state, but omitting to provide by such act for the disposal of pending cases in this court by appeal, or writ of error, it may constitutionally and properly pass such provision for them subsequently."
>
> *Freeborn* v. *Smith*, 2 Wall., p. 160.
> *Benner* v. *Porter*, 9 How., p. 571.
> See also *Cook* v. *U. S.*, *supra*.

In many instances Congress failed to make provision respecting jurisdiction over cases upon the admission of a state, but did so subsequently.

> Florida—Act Feb. 22, 1847 (9 Stats., p. 128).
> Michigan—Sec. 7, Act. Feb. 22, 1847 (9. Stats., p. 128).
> Iowa—Act Feb. 22, 1848 (9 Stats., p. 211).
> Arkansas—Act June 17, 1844 (5 Stats., p. 680).
> Sec. 8, Act of Feb. 27, 1865 (13 Stats., 440).

Act of June 26, 1876 (19 Stats. at L., 62).
Act Sept. 9 and Sept. 28, 1850 (— Stats., p. —).
In re Mayfield, supra.
McNulty v. *Pratt*, 10 How., p. 72.
U. S. v. *Bailey*, F. C. 14995.
Ex parte McCardle, 7 Wall., p. 506.

In none of these instances did the court assume to supply the omission of Congress, although it is possible had not the subsequent legislation been enacted, hundreds of men charged with crime would have gone unwhipped of punishment.

Benner v. *Porter*, 9 How., p. 121, is an interesting case on the subject.

Porter filed a libel in admiralty against Benner *et al.* in the Superior Court for the Southern District of the Territory of Florida on March 24th, 1846. Florida had been admitted as a state on March 3, 1845, and a United States District and Circuit Court created therefor, without any provision, however, for the trial or disposition of either pending or non-pending matters. The state had by its Constitution provided for the disposition of matters of state cognizance. It was contended that in the absence of some provision by Congress the territorial courts continued in existence to dispose of pending causes and matters which had arisen prior to statehood. While the question decided is not in point here, much that the court says is applicable and very instructive.

> "The distinction between the Federal and state jurisdictions under the Constitution of the United States has no foundation in these territorial governments. * * * They are legislative governments, and their courts legislative

courts. * * * There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and Federal jurisdiction. * * *

We think it clear, therefore, that on the unconditional admission of Florida into the Union as a state, on the 3d of March, 1845, the territorial government was displaced * * * and no jurisdiction existed in Federal cases until Congress interfered and extended the judicial tribunals of the Union over it. * * *

Congress on the same day on which the act passed admitting Florida as a state organized the state into a judicial district. * * * It is true the judge was not appointed to fill the office until the 8th of July, 1846, a year and five months afterwards; *but the court was established and invested with jurisdiction over the Federal cases. The powers remained in abeyance until the office was constitutionally filled.* The vesting of the judicial power did not depend upon the appointment of the officer to administer it, as the grant in the Constitution to Congress to ordain and establish inferior courts, and to invest them with the judicial power of the Union, is complete in itself; and they had acted and established the court, and invested it with the power, without condition or qualification. * * *

Neither the act of Congress admitting the Territory of Florida as a state into the Union nor the one organizing the District Court within it made any provision for the transfer into the District Court of the cases of Federal jurisdiction pending at the time in the territorial courts. Those cases were, therefore, left in the state in which they stood at the change of government until the *Act of Congress of 22d February, 1847.*"

The actual existence of the court is unnecessary at the time the offense is committed, see *Cook* v. *United States*, 138 U. S., 157.

Congress within a few months amended the act under consideration adopting the classification for federal and state matters which had theretofore been made on the admission of other states, repealing the one provided originally in this act. It has been suggested that this may have revived the jurisdiction of the Indian Territory courts. Be that as it may, it disposes of the argument that Congress never intended by Section 14 to allow men to go unpunished for a period of seventeen months. It is an exercise of the power of Congress when it saw fit to modify the provision of the Enabling Act to meet conditions as they actually existed.

The provisions of Section 14, whether they be considered wise or unwise as applied to existing conditions, did not in any way give immunity from ultimate indictment and punishment to any one.

That the results predicted could not transpire in any event may be further shown by the fact that the Supreme Court of the State of Oklahoma has held that the state courts (under the Enabling Act as amended by the Act of March 4, 1907), possess the power and jurisdiction to return indictments and to punish those guilty of crimes and offenses of usual state cognizance and committed prior to the admission of the state into the Union and for which no indictment had been returned by the territorial courts. The court does not pretend to decide that Section 14 of the original act did not deprive the territorial courts of jurisdiction; but simply that under the law as it now exists, if the offenses were of that char-

acter which, if committed within the state would have been cognizable in the state courts, then the courts of Oklahoma have jurisdiction, even though no prosecution had been instituted prior to statehood. *Ex parte Buchanan*, 94 Pac., 943.

The court in its opinion in the case at bar lays special stress on the language of Section 13 creating the United States Courts in the proposed state. (Record, p. 14.) Instead of the words in that section militating against the views here advanced, we respectfully submit they really confirm them. It never was, and it is not now, contended by appellant that any of the authority conferred by the Enabling Act upon either the state or federal jurisdictions therein created could be exercised prior to the admission of the State of Oklahoma into the Union. All such authority remained in abeyance until the state was admitted, and, with it, the power to return indictments for crimes committed after June 16th, 1906, or prior thereto, where indictments had "not yet" (*i. e.*, June 16th, 1906) been returned. The state courts have so held as to matters cognizable by them. Conceding that Congress in Section 13 used words of a future tense in creating the courts, is it not significant that in the very next paragraph in providing for the jurisdiction of those courts, it would use words of a future tense? We cannot impute ignorance or want of care to Congress, and certainly such imputation would be unwarranted when a careful consideration of the entire act clearly shows that the subject of jurisdiction of pending as well as nonpending cases is fully provided for and the result is harmonious. The confusion that resulted in several states, particularly Utah, as disclosed in *Thompson* v.

Utah, supra, and *State* v. *Parker, supra*, is entirely avoided.

The Enabling Act of June 16, 1906, it cannot be doubted, became effective on its passage. The exercise of the powers and the discharge of the duties therein conferred and imposed simply remained in abeyance until the proper time. Even Section 13 is a present vesting of judicial power to become operative on the admission of the state.

Permit us a supposition. Suppose Congress had intended, for reasons deemed by it sufficient, to take away from the United States Courts in the Indian Territory power to initiate prosecutions after June 16, 1906, and to vest the same in the United States Courts created by that act to be exercised when they should be organized, could provision therefor have been more clearly defined and expressed? Then is it not our duty, in giving the language used its natural and ordinary meaning, to conclude that such was in fact the purpose of Congress?

It is respectfully submitted that the effect of the construction adopted by the lower court is to substitute an entirely new provision. The word "*hereafter*" must be changed to "*thereafter*," and the sentence "*before the passage of this act in which indictments have not yet been found or prosecutions instituted*," must be entirely eliminated or ignored. To contend that the executive and legislative branches of this government did not know the difference between the words "hereafter" and "thereafter," "before" and "after," and "not yet" and "not then" is to impute to them an ignorance incompatible with their high station and to pursue a course of construction contrary to the rules laid down by this court from the

time of its creation. The marked deviation of this section from the other portions of the act referred to only gives it emphasis and importance.

The case at bar comes under the first class mentioned in Section 14, being one of those "hereafter committed." If anything were needed to demonstrate that Congress had clearly understood the use of the word "hereafter" and that it was intended to refer to the date of the passage of the act, the remaining provisions of the section would settle it beyond the possibility of a doubt, for it immediately makes like reference to all offenses "committed *before the passage of this act* in which indictments *have not yet* been found." * * *

THE SECOND QUESTION.

(g) The sentence of the appellant to a place of confinement not authorized by law is void.

The petitioner was sentenced to confinement for life in the United States penitentiary at *Fort* Leavenworth, Kansas. Under the law he should have been committed to a prison located at another and different place, to-wit, the United States penitentiary, at *Leavenworth*, Kansas.

Section 5541 of the Revised Statutes of the United States provides:

> "In every case where the person convicted of any offense against the laws of the United States is sentenced to imprisonment for a period longer than one year the court by which the

> sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state." * * *

And Section 5546 provides that where there is no suitable penitentiary or jail the attorney general may designate the one to which such prisoners shall be sentenced and confined.

There being no suitable prison in the Indian Territory, the attorney general had the authority under said Section 5546 to designate the place of confinement for prisoners sentenced to a penitentiary. The United States penitentiary at *Fort* Leavenworth was generally designated for the Indian Territory. This, as the court will take judicial knowledge, was a military prison before being placed under the control of the Department of Justice. In the report of the attorney general for the year 1906, it is said, at page 43:

> "On the *1st of February, 1906*, the old military prison at Fort Leavenworth, theretofore used as the United States penitentiary, was returned to the War Department under the act of Congress which provided for its use as a penitentiary and for its return to that department when the buildings at the new penitentiary should be so far completed as to permit of their occupancy, and of such return."

Petitioner herein was convicted and sentenced on June 17, 1907, and subsequent to such return to the War Department.

The court will also take judicial knowledge of the fact that the United States penitentiary at *Leavenworth*, Kansas, is a civil prison and that the same

was being used as a place of confinement for federal prisoners convicted in the civil courts of the United States at the time the sentence herein complained of was imposed, namely, June 17th, 1907. Appellant is unable to exhibit for the information of the court the orders and records of the Department of Justice showing these facts for the reason that the request for the same made by him was disregarded by the attorney general. These facts are fully set out in appellant's application. At the hearing below they were conceded to be correct and the court so states in the closing paragraphs of its opinion. Upon this record, we are informed that prior to the sentence and issuance of the mittimus herein, the Attorney General of the United States, acting in conformity with law, had, by proper order, which had the force of law designated the United States penitentiary at *Leavenworth*, Kansas, as the place of confinement for prisoners of the class of appellant, convicted in the United States Court for the Northern District of the Indian Territory; which order was in full force and effect at the time the sentence was pronounced and the mittimus issued in this case.

While that order was in force, the court was without authority to sentence appellant to confinement at any other place, and sentence of him to confinement in the military prison at *Fort* Leavenworth was contrary to law and void.

The court must possess authority to impose the particular sentence, otherwise its judgment is void.

Church on Habeas Corpus, Sec. 362.
In re Neilson, 131 U. S., p. 176.
In re Mills, 135 U. S., p. 263.
In re Bonner, 151 U. S., p. 242.

The authorities agree that a judgment or sentence rendered by a court in a criminal cause must conform strictly and precisely with the law and no deviation therefrom will be tolerated. This applies to the designation of the place of confinement as much as to any other part of the sentence.

The judgment is void when the prisoner is sentenced to the wrong place of confinement.

Church on Habeas Corpus, Sec. 351.
In re Bonner, supra.
In re Mills, supra.
In re Christian, 82 Fed., 204.
State v. *Smith*, 10 Nev., 125.
Ex parte Sylvester, 81 Cal., 199.
Ex parte Moon Fook, 72 Cal., 10.
Shepard v. *Com.*, 2 Met. (Mass.), 419.
Elliott v. *People*, 13 Mich., 365.

In re Bonner, 151 U. S., p. 242, the law is clearly stated by this court.

The defendant was convicted of larceny in the United States Court in the Indian Territory and sentenced to the penitentiary at Anamosa, Iowa, for the term of one year.

Section 5541 of the Revised Statutes provides that:

> "Any person convicted of any offense and who is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary." * *

The court held that the prisoner had been sentenced to the wrong place of confinement. That he

should have been sentenced to imprisonment in a jail instead of the penitentiary at Anamosa, inasmuch as the sentence was for one year and no longer, the court saying:

> "Whatever discretion, therefore, the court may possess in prescribing the extent of imprisonment as a punishment for the offense committed, it cannot in specifying the place of imprisonment name one of these institutions. * * * It follows that the court had no jurisdiction to order an imprisonment when the place is not specified by law. * * *
>
> Counsel for the government admits that upon the authority of that case, construing the Revised Statutes, the petitioner should not have been sentenced to imprisonment in the penitentiary, but he claims that the judgment and sentence are not for that cause void, so as to entitle the petitioner to a writ of habeas corpus for his discharge; and he asks the court to reconsider the doctrine announced, contending that neither the reason of the law nor the authorities sustain the position. According to his argument, it would seem that the court does not exceed its jurisdiction when it directs imprisonment in a penitentiary, to which place it is expressly forbidden to order it. * * * It would be as well, and be equally within its authority, for the court to order the imprisonment to be in the guard house of a fort, or the hulks of a prison ship, or in any other place not specified in the law. * * *
>
> We are unable to agree with the learned counsel, but are of opinion that, in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction, and to try the case, and to render judgment. It cannot pass beyond those limits in any essential requirement, in either stage of these proceedings; and its authority in those particu-

lars is not to be enlarged by any mere inferences from the law, or doubtful construction of its terms. * * * If the law prescribed a place of imprisonment, the court cannot direct a different place, not authorized. It cannot direct imprisonment in a penitentiary, when the law assigns that institution for imprisonment under judgments of a different character. If the case be a capital one, and the punishment be death, it must be inflicted in the form prescribed by law. Although life is to be extinguished, it cannot be by any other mode. * * *

The law of our country takes care, or should take care, that not the weight of a judge's finger nail shall fall upon any one, except as specifically authorized. A rigid adherence to this doctrine will give far greater security and safety to the citizen than permitting the exercise of an unlimited discretion on the part of the courts in the imposition of punishments, as to their extent, or as to the mode or place of their execution, leaving the injured party, in case of error, to the slow remedy of an appeal from the erroneous judgment or order, which, in most cases, would be unavailing to give relief." * * *

The case of *Shepard* v. *Com., supra,* arose in Massachusetts, where the trial court sentenced a prisoner to hard labor in a house of correction at one place for a term of four years, when the law provided that prisoners sentenced for that term should be confined in the state's prison at another place. The writ was granted and the petitioner discharged.

In *ex parte Sylvester, supra,* an ordinance in a California city provided that persons convicted of carrying concealed weapons should be confined in the city prison. The petitioner was convicted of the charge, but sentenced to confinement in the county

jail. The sentence was held to be absolutely void and the prisoner was ordered discharged.

So it will be seen, following *In re Bonner, supra*, and other cases, the courts adhere to the rule that the judgment must conform strictly to the law in such case made and provided. To permit any deviation therefrom would invite laxity in the rendition of judgments and imposition of sentences, resulting in endless confusion and annoyance, and would deprive a citizen of the protection and guaranties so strongly and clearly vouchsafed to him by the Constitution.

Under Sec. 5541, R. S., the court imposing the sentence in this case was to fix the place where it should be executed. By the order of the Attorney General under Sec. 5546 the penitentiary at Fort Leavenworth should have been designated. Failure so to direct, and a sentence of the defendant to a place not authorized by law, rendered the judgment void. He could not lawfully be confined in the place provided by law because the sentence under which he was committed did not so direct; he could not lawfully be confined in the place where the court directed the sentence to be executed because it was not a place designated by law for the punishment of prisoners of the class to which he belonged.

(h) The marshal under the mittimus issued to him had no authority to deliver the prisoner to anyone save the keeper of the penitentiary at Fort Leavenworth, and the restraint of appellant by the respondent under said sentence and mittimus is wrongful.

The mittimus (Rec., pp. 8, 9) recites:

> "Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court here that the said P. M. Childers, for the crime aforesaid, be imprisoned in *the penitentiary situated at Fort Leavenworth, Kan.*, for the term of his natural life at hard labor. * * *
>
> It is further considered *that the marshal* of this court, in whose custody the said P. M. Childers is now here committed, *shall receive and safely keep and convey the body of said P. M. Childers hence to said penitentiary without delay, and deliver him to the custody of the keeper of said penitentiary.* * * *
>
> And it is further ordered that the clerk of this court furnish the marshal of this court with two duly certified copies of this judgment, sentence and order, one of which shall be delivered to the keeper of said penitentiary and the other returned by the marshal of this court, with a full and true account of the execution of the same."

Under this judgment, sentence and order, constituting the mittimus, it was clearly the duty of the marshal, a ministerial officer, performing a purely ministerial duty, to deliver the prisoner to the keeper of the penitentiary at *Ft. Leavenworth*. Indeed, he rendered himself personally liable to do otherwise.

The respondent herein, the keeper of another and different prison, under said mittimus had no right or authority to receive the prisoner, and violated the law in so doing. Neither were vested with any discretion in the premises.

From the earliest period of criminal jurisprudence it has been considered an elementary rule that to relieve an officer executing a sentence from liability, the sentence of the court must be strictly complied with. The illustration is often cited that if he beheads or electrocutes a prisoner whose sentence is hanging, or *vice versa*, he is guilty of murder.

Hale P. C., p. 433.
Kerr on Homicide, p. 9 (citing Blackstone & Coke).

The marshal, upon receiving into his custody a prisoner under a mittimus with which he could not lawfully comply, should have returned the prisoner to the court from which he was received for sentence in accordance with the law.

In re Bonner, 151 U. S., p. 242.
In re Christain, 82 Fed., p. 204.

In the last case cited, the petitioner was sentenced by the U. S. Court in the Indian Territory to the penitentiary at Anamosa, Iowa (the same having been previously designated by the Attorney General) for the term of one year, when under existing law, a person sentenced to prison for that period of time should have been sentenced to the U. S. jail at Ft. Smith. He was discharged on a writ of habeas corpus.

Therefore, the delivery of appellant by the marshal, being wrongful and a violation of the process under which he was committed into his custody, his acceptance and detention by the Respondent thereunder is without warrant or authority of law. Applying the very apt and forcible language of Mr. Justice Field, it would be as well, and equally within the authority of the officer, to have delivered the prisoner to the keeper of a guard house, or a fort, or the hulks of a prison ship, or in any other place not specified in the sentence.

To the argument on this question the court below made this reply:

> "It is conceded that the proper designation of the place of punishment is as claimed by the petitioner, but as he is now incarcerated and undergoing punishment in the identical institution he would have been confined in had the designation been as he contends it should have been, *and as required by law*, it is quite clear the rignts of the petitioner are not prejudiced thereby. There is no other institution answering to that name in the judgment, and the word 'fort' therein may be disregarded."

An easy solution of the difficulty, indeed! Simply disregard that part of the name which designates the particular place, thus making it another. The similarity of names in this instance makes it a simple matter. But if the principle be a sound one, it should be applicable generally. Suppose the sentence had been to Anamosa, Iowa, and the prisoner had been delivered to the keeper of the prison at Leavenworth, Kansas? Would the court apply

the same rule? The court below seems to have overlooked the fact, as shown by the record, that there is a prison at Ft. Leavenworth "answering to the name in the judgment."

Regardless of whether that be true, and regardless of whether it was indispensable that the place of punishment be fixed in the sentence (although Sec. 5541, R. S., so provides), in this case the court did fix the place of punishment as a part of the sentence, and even if erroneous, it did not lie in the power of the officer executing the process to change it. The court that imposed it alone was the only one to do that. He had no right to disregard or change any part of the sentence, and the court below should not have sanctioned his so doing.

If a judgment may be so disregarded, and a sentence of the court changed by the incarceration of the prisoner in a place not designated by law, it would seem that the liability of an officer for even an abuse of authority or indiscretion would not subject him to liability. And if the position of the lower court be correct, it would seem strange that in the Bonner case, in the Christian case, and in the other cases cited, instead of granting the writ and permitting the defendant to be discharged, the suggestion was not made that that portion of the sentence designating the place of imprisonment be ignored, and that the prisoner be simply delivered over to the keeper of the prison to which he ought to have been sent, and then being incarcerated in the identical institution to which he contends he should have been sent, *and the one required by law*, he could not and ought not complain.

This is not a question of prejudice or want of prejudice. If such were the case, petitioner would be left to his remedy on appeal or writ of error. Petitioner complains that the action of the court was utterly void, because in excess of its jurisdiction. Being void, it is a dead limb upon the tree of justice, and no amount of pruning can give life to it.

We are not unmindful of the rule that where the law designates the place of confinement, or the particular kind of punishment, the same is not necessarily a part of the judgment of the court. If the law provides punishment by imprisonment in the state prison which is located at a definite place, for instance, the court need not recite in its sentence the name of the place where the prison is located. Simply a sentence to the state prison is sufficient, and the law will read into the sentence the particular place of confinement. But we respectfully submit that when the court does undertake to designate the particular place of confinement, it must designate the one provided by law. Failing to do so, and designating a different institution or one located at a different place than that provided by law, it acts in excess of its jurisdiction and such sentence is void. So when the law provides for punishment by imprisonment in the jail, a sentence to the penitentiary is void (*In re Bonner*). Again where the punishment, as prescribed by law, shall be imprisonment at hard labor, a sentence omitting the words "at hard labor" is void (*in re Savage*). Or where the punishment is death by hanging, the addition thereto in the sentence of solitary confinement and withholding from the prisoner the

date of execution renders the sentence void (*In re Medley*). Such acts were in excess of the jurisdiction of the court. The officer charged with the execution of such sentence had no power to disregard the sentence as imposed and execute the proper one imposed by law. To do so would constitute such officer with power to review the judgment of the court and make the sentence one, in fact, of the officer and not of the court. It is the duty of the court to pronounce sentence in accordance with the law. Failing to do so, the court charged with that duty can correct the sentence. Such is the holding in *In re Welty*, 123 Fed., 122, as to the omission of the words "at hard labor" and *In re Medley, supra*, as to the addition of solitary confinement and ignorance of date of execution. In each instance, the sentence as imposed was recognized as being void and before the state could claim its punishment a new and correct sentence must be pronounced, which would be in accordance with law and not in disregard thereof.

Concluding, we respectfully submit, referring to the first question presented, the conclusion reached by the lower court is not supported by the plain and positive provisions of the Enabling Act, and is contrary to the rules of construction repeatedly declared by this Court.

Congress, it seems to us, in clear and specific language, invested the courts created by that act with jurisdiction over the offenses therein enumerated, of which this is one. Attention is again respectfully invited to the provision that the powers created and conferred by the act were to *remain in abeyance* until the state was organized, which har-

monizes with the construction contended for. If the act was not a present vesting of the powers therein provided for, in this and other respects, why the saving clause holding those powers in abeyance?

If Congress afterwards changed its purpose respecting these cases, or discovered its mistake, if such it may be called, in the definition of federal offenses, that could in no way validate the indictment previously returned in this case. Jurisdiction must, of course, exist at the time the indictment is found. If such jurisdiction was, in fact, restored by Amendment of March 4, 1907, to the Territorial Courts, a new indictment should then have been returned. This was not done and under the provisions of Section 14 of the Enabling Act the indictment on which the appellant was convicted is absolutely void for want of jurisdiction in the court in which it was returned. The lower court avoided this conclusion by judicially legislating out of the act a provision which the law making powers had deliberately legislated into it. But legislation is no part of the function of the judiciary. As forcibly stated by this court, "Our duty is to give effect to the will of the law making power, when expressed within the limits of the Constitution." *Barney* v. *Latham*, 103 U. S., p. 212; and a judicial duty is no less fitly performed by a court in declining an ungranted jurisdiction, than in exercising that which the Con-

stitution and laws confer. *Ex parte McCardle*, 7 Wall, p. 515.

On this ground, as well as upon those presented under the second question raised in the brief, we believe the petitioner should be discharged.

Respectfully submitted,

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